Supreme Court, U.S.
FILED
APR 23 1991
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No. 90-1340

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ELEANOR S. SIMPSON

Petitioner,

vs.

DONALD M. SIMPSON; TERRY C. YOUNG; GILES, HEDRICK & ROBINSON, P.A.; TANYA PLAUT; LAWSON LAMAR, SHERIFF OF ORANGE COUNTY, FLORIDA; AND MINNIE BRIDGES;

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS'S BRIEF IN OPPOSITION

William G. Osborne, Esquire
538 East Washington Street
Orlando, Florida 32801
(407) 843-5211
Attorney for Respondent, Donald Simpson

Tanya M. Plaut, Esquire
506 Mariposa Street
Orlando, Florida 32801
(407) 425-6610
Attorney for Respondent, Tanya Plaut

Lavinia Dierking, Esquire
11 East Pine Street
Orlando, Florida 32801
(407) 425-1802

Jeffrey M. Fleming, Esquire
Post Office Box 3427
Orlando, Florida 32802
(407) 849-6459

Attorneys for Respondents, Terry C. Young
and Giles, Hedrick & Robinson, P.A.

Jeffrey G. Slater, Esquire
605 East Robinson Street
Orlando, Florida 32801
(407) 425-4251
Attorney for Respondent,
Lawson Lamar, Sheriff
of Orange County, Florida

James W. Glatt, Esquire
111 North Orange Avenue
Suite 2000
Orlando, Florida 32801
(407) 841-7000
Attorney for Respondent,
Minnie Bridges

QUESTIONS PRESENTED

Respondents would respectfully submit that neither the decision below nor the facts contained in the record, raise the questions presented in the Petitioner's brief. Therefore, Respondents respectfully restate the questions presented that relate to this Court's discretionary jurisdiction to issue a Writ of Certiorari:

I.

WHETHER SALE BY SHERIFF OF PETITIONER'S HALF INTEREST IN HER FORMER MARITAL RESIDENCE WAS CONDUCTED PURSUANT TO A CONSTITUTIONAL STATE STATUTE AND WHETHER PETITIONER WAS DENIED SUBSTANTIVE AND PROCEDURAL DUE PROCESS.

II.

WHETHER THE PETITIONER WAS DENIED SUBSTANTIVE AND PROCEDURAL DUE PROCESS WHEN SHE FAILED TO MAKE A BID ON HER FORMER MARITAL RESIDENCE AND WHEN SHE WAS NOT ALLOWED AN OPPORTUNITY TO REDEEM PRIOR TO FINAL DEPRIVATION OF HER PROPERTY.

III.

WHETHER THE TRIAL COURT ERRED IN DISMISSING WITH PREJUDICE AND GRANTING RESPONDANT'S MOTION FOR SUMMARY JUDGMENT ON PETITIONER'S CLAIMS PREDICATED UPON ALLEGATIONS OF UNLAWFUL ARREST AND EXCESSIVE USE OF FORCE.

IV.

WHETHER THE TRIAL COURT ERRED IN HOLDING THAT PETITIONER FAILED TO ADEQUATELY PLEAD OR PROVE A CONSPIRACY BECAUSE THE "UNDER COLOR OF STATE LAW" REQUIREMENT OF 42 U.S.C. §1983 HAD NOT BEEN MET.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED..... i

TABLE OF AUTHORITIES..... v

JURISDICTIONAL REASONS FOR DENIAL OF WRIT..... 1

STATEMENT OF THE CASE..... 11

I. THE SALE BY SHERIFF OF PETITIONER'S HALF INTEREST IN HER FORMER MARITAL RESIDENCE WAS CONDUCTED PURSUANT TO A CONSTITUTIONAL STATE STATUTE AND DID NOT DENY HER SUBSTANTIVE NOR PROCEDURAL DUE PROCESS..... 16

II. THE PETITIONER WAS NOT PRECLUDED FROM MAKING A BID ON HER FORMER MARITAL RESIDENCE AND WAS NOT DENIED SUBSTANTIVE NOR PROCEDURAL DUE PROCESS WHEN SHE WAS NOT ALLOWED AN OPPORTUNITY TO REDEEM PRIOR TO FINAL DEPRIVATION OF HER PROPERTY..... 36

III. THE TRIAL COURT DID NOT ERR IN DISMISSING WITH PREJUDICE AND GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON PETITIONER'S CLAIMS PREDICATED UPON ALLEGATIONS OF UNLAWFUL ARREST AND EXCESSIVE USE OF FORCE..... 44

IV. THE TRIAL COURT DID NOT ERR WHEN IT HELD THAT PETITIONER FAILED TO ADEQUATELY PLEAD OR PROVE A CONSPIRACY BECAUSE THE "UNDER COLOR OF STATE LAW" REQUIREMENT OF U.S.C. 1983 HAD NOT BEEN MET..... 54

CONCLUSION..... 64

TABLE OF AUTHORITIES

CASES	PAGE
Adickes v. S. H. Kress & Company, 398 U.S. 27 144, (1970)	54
Almon v. Sandlin, 603 F.2d 503 (5th Cir. 1979)	26
Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486 (11th Cir. 1985)	29
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986)	49
Arlt v. Buchanan, 190 So.2d 575 (Fla. 1966)	21
Augenti v. Cappellini, 84 F.R.D. (N. PA. 1979)	55
Billingsley v. Seibels, 433 F.Supp. 1 (N.D. Ala. 1976)	34
Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)	26
Brown v. City of Clewiston, 848 F.2d 1534, 1537 (11th Cir. 1988)	49
Bushman v. Safeway Stores, Inc., 608 F.Supp. 232 (D.C. Nev. (1985)	30, 31
Byrd v. Clark, 783 F.2d 1002, 1008 (11th Cir. 1986)	47

TABLE OF AUTHORITIES

CASES	PAGE
Califano v. Goldfarb, 430 U.S. 199 (1977)	9, 39
Camp v. Mosely, 2 Fla. 171 (Fla. 1848)	21
Celotex Corp v. Catrett, 477 U.S. 317, 323 1986)	48
Cory v. Parks, 386 So.2d 292 (Fla. 2d DCA 1980)	39
Cotton States Mutual Insurance Company v. Anderson, 749 F.2d 663 (11th Cir. 1984)	33
Dennis v. Sparks, 449 U.S. 24, 27-29 (1980)	54, 57
Edward Leasing Corp. v. Uhlig, 652 F.Supp. 1409 (S.D. Fla. 1987)	38
E. G. McDougald v. Jenson, 786 F.2d. 1465, 1488-98 (11th Cir. 1986)	60
First Alabama Bank of Montgomery, N.A. v. Parsons Steel, Inc., 747 F.2d 1367 (11th Cir. 1984)	30
Flannery v. Green, 482 So.2d 400 (Fla. 2d DCA 1986)	38
Griffin v. Breckenridge, 403 U.S. 88 (1971)	42

TABLE OF AUTHORITIES

CASES — PAGE

Hann v. Carson, 461 F.Supp. 854 (M.D. Fla. 1978).....32, 33

Hassell v. City of Philadelphia, 507 F.Supp. 814, 818, (E.D. Pa. 1981)..... 55

Herendeen v. Champion International Corp., 525 F.2d 130 (2nd Cir. 1975)..... 31

Holden v. Estate of Gardner, 420 So.2d 1082 (Fla. 1982).....9, 39

In Re: Estate of Melisi, 440 So.2d 58 (Fla. 4th DCA 1983)..... 39

In Re: Shorr's Estate, 409 So.2d 487 (Fla. 4th DCA 1982)..... 38

John Alden Life Insurance Company v. Cavendes, 591 F.Supp. 362 (S.D. Fla. 1984)..... 30

Matter of Raiford, 695 F.2d 521 (11th Cir. 1983)..... 33

McAlice v. Anderson, 403 So.2d 563 (Fla. 3rd DCA 1981)..... 22

Nationwide Financial Corp. of Colorado v. Thompson, 400 So.2d 559 (Fla. 1st DCA 1981)... 40

Ohio Realty Investment Corp. v. Southern Bank of West Palm Beach, 300 So.2d 679 (Fla. 1974)..... 19

TABLE OF AUTHORITIES

CASES — PAGE

Olmsted v. Aamco Oil Company, 725 F.2d 627 (11th Cir. 1984), reh. den. 731 F.2d 891 .....29, 30

Parratt v. Taylor, 451 U.S. 527 (1981)..... 23

Phillips v. Mashburn, 746 F.2d. 782, 785 (11th Cir. 1984)..... 56

Public Health Trust of Dade County v. Lopez, 531 So.2d 946 (Fla. 1988)..... 40

Rice v. Sioux City Memorial Park Cemetary, 349 U.S. 70, 75 S.Ct. 614 (1955)..... 11

Robinson v. McCorkle, 462 F.2d. 111, 113 (3rd. Cir.) cert. denied, 409 U.S. 1042 (1972).... 43

Rosenthal v. State of Nevada, 514 F.Supp. 907 (D.C. Nev. 1981)..... 32

Ryan's Furniture Exchange, Inc. v. McNair,162 So 483 (Fla. 1935)..... 23

Staley v. Ledbetter, 837 F.2d. 1016, 1018 (11th Cir. 1988)..... 57

State, Ex Rel. Raulerson v. Sloan, 194 So. 128 (Fla. 1938).. 19

TABLE OF AUTHORITIES

CASES — PAGE

United States v. Stewart, 689 F.2d 759 (8th Cir. 1982) cert. denied, 103 S.Ct. 1427, 460 U.S. 1037, 75 L.Ed.2d 788..... 30

CONSTITUTIONS

Florida Constitution, Article X... 40

Florida Constitution, Article X, Section 4.....27, 36, 41

Florida Constitution, Article X, Section 4A..... 38

STATUTES

28 U.S.C. Section 1254(1)..... 3

42 U.S.C. Section 1983....6, 9, 23, 35 37, 42, 44, 54, 55, 56, 60, 61, 63

42 U.S.C. Section 1985..... 42

42 U.S.C. Section 1985(3).....7, 8, 38 39, 41, 42, 44

Florida Statutes, Section 30.15(2)..... 21

Florida Statutes, Section 30.30... 20

Florida Statutes, Section 45.031.....19, 20

TABLE OF AUTHORITIES

STATUTES **PAGE**

Florida Statutes, Section 56.22.....16, 19, 25, 26, 36

Florida Statutes, Chapter 222..... 23

RULES

Supreme Court Rule 10..... 1

Supreme Court Rule 10.1.(a).....1, 2

Supreme Court Rule 10.1.(b)..... 2

Supreme Court Rule 10.1.(c)..... 2

Supreme Court Rule 14..... 1

Supreme Court Rule 14.1.(j)..... 2

JURISDICTIONAL REASONS FOR DENIAL OF WRIT

Petitioner has provided no jurisdictional basis for the Supreme Court to accept certiorari. Rule 14 of the Supreme Court Rules provides that a petition for writ of certiorari shall contain

> .1.(j) A direct and concise statement amplifying the reasons relied on for the allowance of the writ. See Rule 10.

Supreme Court Rule 10 provides that a petition for a writ of certiorari will be granted "only when there are special and important reasons therefor." Rule 10 further delineates the character of reasons that will be considered, including the following:

> .1.(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of appeals on the same matter; or has decided a federal question in a way in conflict with the state court of last record; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a

> departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Clearly, Petitioner has failed to comply with either Supreme Court Rule 14.1.(j) or Rule 10.1.(a)-(c). Respondents respectfully submit that Petitioner's lack of compliance with these rules stems from Petitioner's total inability to provide a reasonable basis for this Court to accept certiorari in this matter. The Petitioner has provided this Court with none of the above basis for granting the writ of certiorari. Fur-

ther, the only basis for jurisdiction the Petitioner has alleged in her brief is Title 28, United States Code §1254(1). Page 3 of Petition. Said provision is merely the general jurisdictional statement which indicates that cases in the Court of Appeals may be reviewed by the Supreme Court by writ of certiorari.

There is nothing new before this Honorable Court that was not presented both to the 11th Circuit Court of Appeals and the Middle District (trial) Court, Orlando, Florida. In essence, Petitioner reargues the entire case as presented at the trial court and 11th Circuit levels. Petitioner does not allege any recognizable error in either court's decision. Clearly, Petitioner just does not like what the trial court and 11th Circuit decided. There are no reviewable or reversible questions from either the trial court's decision or the 11th Cir-

cuit's per curiam affirmance of the same.

The decision at the trial court level turned on its own facts affecting no others than the litigants participating in the matter. The trial court's order, granting various motions to dismiss and summary judgment, dated July 10, 1989, was 27 pages in length. It addressed the record evidence in combination with the applicable law on each issue presented. The clear conclusion of the trial court was that Petitioner had not presented any record evidence to support her claim and summary judgment was entered accordingly. Perhaps the most telling remark of the trial court appears at page 5 of its order where it was stated as follows:

> This complaint is essentially a complaint about the decisions of state court judges under the guise of a Section 1983 action. Federal courts, however, are not a forum for appealing state court decisions. (Citations omitted).

Petitioner's first issue - whether she was denied substantive and procedural due process of law when she was not allowed to make a bid on homestead property and was not allowed an opportunity to redeem - was fully addressed by the trial court at pages 4-5 of its order. The trial court specifically pointed out that

> ... all of plaintiff's allegations which rely on the status of a judge to satisfy the 'under color of state law' requirement depend solely on conclusory statements that there was a conspiracy. The law in the Eleventh Circuit is that '[t]he naked assertion of a conspiracy between a state judge and private defendants without supporting operative facts provides an insufficient state action nexus for a Section 1983 action.'

(Citations omitted).

Further on page 6, the court stated,

> The third amended complaint therefore is devoid of allegations of fact showing an agreement and concerted action among the Defendants and the judges named in the Complaint.

> There are simply no operative facts, merely a naked assertion by the Plaintiff in her pleading, that a conspiracy existed. . . .

The trial court noted this continued lack of evidence from Petitioner even though Petitioner had sufficient opportunity to gather evidentiary support for her claims. (Emphasis added). And finally as to the §1983 matters, the court stated,

> . . . Defendants have carried their burden of demonstrating that there are no genuine issues of material fact that necessitate a trial, and plaintiff has failed to offer any proof of a conspiracy involving a judge. Having failed to provide an essential element of her case, summary judgment is appropriate on plaintiff's claim of a conspiracy involving state court judges in violation of 42 USC §1983. (Order at page 8).

As to the actual notice of sale, the trial court specifically found the published notice was not inadequate. The trial court recognized that Petitioner

was active in attempting to stop the sale on her behalf and in fact attended the sale. Order at p. 12.

Petitioner also claims she was denied equal protection under the law by not being allowed to claim homestead exemption on her property interest in the former marital residence of the parties. The Petitioner claims that Respondents operated together to defeat and deprive the Petitioner of her homestead in violation of 42 U.S.C. §1985(3). To put it simply, the trial court found that

> Not only does Plaintiff's Complaint fail to plead facts to support a conspiracy in violation of 42 U.S.C. §1985(3), making a motion to dismiss appropriate, but also there are no evidentiary facts of record to support such contention. (Order at page 16).

The court noted that the defendants were merely participating in a sheriff sale that was

> the result of a lien placed on

> Plaintiff's interest in realty by Tanya Plaut and an order of a state trial court for foreclosure of such lien. There is no evidence of a plot to initiate and consummate the sale in an improper manner, unauthorized by law, to deprive Plaintiff of her property. Participation in a public sale does not constitute evidence of a conspiracy in violation of 42 U.S.C. §1985(3). (Order at page 17).

Further, the trial court found that Petitioner did not state an independent claim for denial of equal protection under 42 U.S.C. §1985(3) and summary judgment for Respondents was entered on Petitioner's claim that Respondents had denied her constitutional right to own and hold homestead property. Order at pp. 18 and 19. The trial court pointed out that the Florida Homestead provision on which the plaintiff relied prior to the date of sale of the property only applied to property "owned by the head of a family." The trial court noted that such a provision did not discriminate on

the basis of gender. (Order at page 18). Citing Califano v. Goldfarb, 430 U.S. 199 (1977) and Holden v. State of Gardner, 420 So.2d 1082 (Fla. 1982). The court pointed out that Petitioner did not allege or contend that she was ever responsible for the welfare of another while she resided on the subject property.

The court also fully dealt with Petitioner's claim that she was denied her right to substantive due process when excessive force was allegedly used against her in the execution of a state and enforceable writs ordered. In particular, the court stated that there was no evidence that the defendants Young or Giles, Hedrick, Robinson conspired with the sheriff's deputies to deprive her of rights secured under 42 U.S.C. §1983. The court indicated that plaintiff was merely relying on conclusory allegations

in the third amended complaint. Order at p. 9 and 10. Clearly, Petitioner is attempting to rehash before this Court matters originally decided in divorce proceedings between Petitioner and Respondent, Donald Simpson. The state appellate process was available to Petitioner to question any decision of the state court. However, Petitioner chose to file a suit in Federal Court, Middle District, Orlando, making various unsupported claims against professional defendants. The trial court, giving Petitioner every benefit of the doubt, found that Petitioner's claims were unsupported by the record evidence. That decision was affirmed per curiam by the 11th Circuit Court of Appeals. Petitioner has no basis for seeking a writ of certiorari to this Court. Premised on the jurisdictional requirements alone, Respondents respectfully submit that Petitioner's

writ of certiorari should be denied. Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S.Ct. 614 (1955).

STATEMENT OF THE CASE

Respondents respectfully disagree with the Statement of the Case as stated by Petitioner and, in clarification, states as follows:

The parties herein will be referred to as they appear before this Court, i.e. Petitioner, Respondent, Respondents or by their respective names.

The Petitioner, Eleanor S. Simpson, and Respondent, Donald Simpson, were divorced on May 24, 1983 in the Circuit Court, in and for Orange County, Florida. (R5-162). Petitioner had numerous attorneys during the course of the divorce proceedings. Mr. Simpson's attorney was Respondent, Terry Young.

The Final Judgment (of Dissolution of Marriage) was entered by Judge William C.

Gridley and provided, inter alia, that Mr. Simpson receive certain personal effects and that the marital home be partitioned equally. (R5-162). Petitioner appealed the Final Judgment, but the Fifth District Court of Appeal per curiam affirmed the Final Judgment on January 31, 1984, and denied rehearing on May 29, 1984. (R5-162).

Petitioner failed to comply with the partition of personal property as stated in the Final Judgment, whereupon on or about August 19, 1983, upon motion of Respondent, Donald Simpson, Judge Gridley entered an Order of Division of Personal Property authorizing the Clerk to issue a Writ of Attachment for the personal property of Mr. Simpson. (R5-162). Subsequently, Mr. Simpson moved the Court to permit the Sheriff's Forcible Entry During Recovery of Personal Property. (R5-162). The Court entered an Order

Granting Permission for Sheriff's Forcible Entry During Recovery of Personal Property on October 4, 1983, after a hearing duly noticed. (R5-162). Simpson interfered with the Respondent, Lawson Lamar's (Sheriff's) execution of said Order and was arrested on or about October 6, 1983.

Respondent Tanya Plaut was one of the attorneys who had represented Petitioner in her dissolution proceedings. Subsequent to the dissolution of marriage, Tanya Plaut filed an action against Eleanor S. Simpson for unpaid attorney's fees. After trial of the issue at which the Petitioner was represented by counsel, a judgment for the fees was entered in the case of Plaut v. Simpson, CI-83-4444, Circuit Court in and for Orange County, Florida. That judgment went unpaid and subsequently, Respondent Plaut executed and levied on Mrs. Simpson's

one-half interest in the marital home to satisfy said judgment. (R5-162). Upon a duly noticed Sheriff's Sale, Mrs. Simpson's one-half interest in the marital home was purchased by Respondent, Donald Simpson. Despite Mrs. Simpson's knowledge of the impending sale, she neglected to timely appear at the Sheriff's Sale to protect her interest. Petitioner admitted she received previous notice of the scheduled Sheriff's Sale of her one-half interest in her marital home. (R5-162; R4-102). In fact, Petitioner prior to the sale sought to prevent the sale by emergency motion, which motion was denied. (R4-102). Petitioner's testimony establishes that she knew that sale was to take place between the hours of 11:00 a.m. and 2:00 p.m., but operated under her own conclusion that the sale "couldn't go through because the court's ruling was incorrect." (R5-162). Respondent,

Donald Simpson did appear and purchased Mrs. Simpson's one-half interest in the marital residence for the amount of Respondent Plaut's judgment, approximately $8,013.87.

Subsequent to the purchase by Respondent Donald Simpson the property was listed with a realtor, Respondent Minnie Bridges, and sold.

Petitioner filed an action in federal court in April of 1985. As noted in the order of July 10, 1989 of the United States District Court, Middle District of Florida, dismissing Petitioner's Third Amended Complaint and granting summary judgment in favor of Respondents Terry Young, Giles, Hedrick & Robinson, P.A. in total and Respondents Simpson and Lawson Lamar in part, Petitioner had ample opportunity to pursue her action in the lower court through discovery, which was extended on numerous times. (R6-194-7).

As further noted by the Middle District Court in its order, Petitioner' entire action was based on the conclusory statements of Petitioner Simpson.

I.

THE SALE BY SHERIFF OF PETITIONER'S HALF INTEREST IN HER FORMER MARITAL RESIDENCE WAS CONDUCTED PURSUANT TO A CONSTITUTIONAL STATE STATUTE AND DID NOT DENY HER SUBSTANTIVE NOR PROCEDURAL DUE PROCESS.

In her complaint Petitioner asserted that the state statute pursuant to which the forced sale of her half-interest in the marital home was conducted, Florida Statute 56.22 (1983), is unconstitutional. (R4-102) She complains that the operation of that statute unconstitutionally deprived her of her right to procedural due process. She claims that the statute is void for vagueness due to its provision that the "sale shall take place between the hours of 11:00 A.M. and 2:00 P.M." Petitioner suggests that the statute did not give her notice of the

exact time of the sale, and therefore the statute is unconstitutional. Petitioner does not claim that she did not receive notice of the sale or that the sale occurred outside the times specified. Rather, she simply alleges that the statute is unconstitutional and the sale void because she was not given a particularized time between the hours of 11:00 A.M. and 2:00 P.M. for the sale.

As the trial court correctly noted in the Order of July 10, 1989, (R6-194) the unrefuted facts of the record show that the sale was conducted pursuant to a lien placed on Petitioner's half-interest in the marital home by her former attorney, Defendant Plaut. Respondent Donald Simpson took advantage of the procedure provided by law and appeared at the designated time and place set forth in the Notice of Sheriff's Sale to bid on the property. Petitioner had the same

opportunity to appear at the designated time to bid on the property. Petitioner admitted that she failed to be timely present at the sale of the home as had been scheduled by the Notice of Sheriff's Sale "due to a misunderstanding" and because she was stuck on the telephone. (First Amended Complaint, par. 11(I).) (Deposition of Petitioner 11/24/86, pages. 98-101)

Prior to the date of sale Petitioner was aware of the fact that a Notice of Sheriff's Sale had been published in the newspaper which announced that the sale would take place between the hours of 11:00 A.M. and 2:00 P.M. on a particular day. (Deposition of Petitioner 1/15/87, pg. 108) In fact, Petitioner had been active, albeit unsuccessfully, in attempting to stop the sale of her one-half interest in the realty. (Deposition of Petitioner 1/15/87, pg. 107).

The fact that Florida Statute 56.22 gives some latitude as to the specific timing of the sale does not make the statute unconstitutionally vague. See Ohio Realty Investment Corp. v. Southern Bank of West Palm Beach, 300 So.2d 679 at n. 1 (Fla. 1974); State, Ex Rel. Rauler-son v. Sloan, 194 So. 128 (Fla. 1938). Nowhere in the Third Amended Complaint is it alleged that the Sheriff's sale conducted on April 30, 1984, did not comport with Florida Statute 56.22.

As a basis for Petitioner's contention that Florida Statute 56.22 is unconstitutional, she compares its contents to Florida Statute 45.031. Those two statutes deal with different types of sales -- one deals with judicial sales while the other deals with execution sales. In fact, subsection (8) of Florida Statute 45.031 specifically states that the statute does not apply to

property sold under executions. Further the requirement in 45.031 that the notice of a judicial sale contain "the time and place of sale" is not inconsistent with a notice which states that the sale shall take place "between the hours of 11:00 A.M. and 2:00 P.M." The constitutional validity of one statute is not to be determined by the contents of another statute.

In selling Petitioner's interest in the property, the Sheriff was simply enforcing a judgment and Writ of Execution issued thereon by a circuit court judge. In making the sale, the Office of Lawson Lamar acted in an administerial capacity. Florida Statute 30.30 expressly provides that a sheriff is not to be held liable for wrongful levy when it is made as required by statute or pursuant to the specific order of a court of competent jurisdiction. A sheriff is

required by statute to execute all writs directed to him to be executed in his county. Florida Statute 30.15(2). He is justified in the execution of a writ regular on its face and issued by competent authority. Camp v. Mosely, 2 Fla. 171 (Fla. 1848).

In her Third Amended Complaint Petitioner has not suggested that the judgment nor Writ of Execution issued thereon appeared invalid or irregular on their face. With respect to the conduct of a sale, a presumption exists that the sheriff complied with the requirements of the law and that the sale was regular in all respects. The burden is on the Petitioner to demonstrate otherwise. Arlt v. Buchanan, 190 So.2d 575 (Fla. 1966). In this case Petitioner has presented no facts indicating that the sale was conducted in an irregular fashion and not in accordance with Florida

Statutes.

Petitioner suggests that an inadequate purchase price received for her half-interest in the marital home provides a sufficient basis for setting aside the sale. First, it should be pointed out that monies received from the sale are not clearly inadequate given that what was being purchased was a half-interest in a home. Second, case law is clear that an inadequate purchase price alone is insufficient basis for setting aside a sheriff's sale. McAlice v. Anderson, 403 So.2d 563 (Fla. 3rd DCA 1981). Finally, Petitioner's suggestion that the sale should be set aside as the result of an inadequate purchase price having been received from the sale raises no federal constitutional issues which would justify the exercise of jurisdiction over Petitioner's claims.

As a general rule, relief against

mere irregularities in an execution (if, in fact, they did exist) must be sought in the original cause, and not in a new and independent proceeding. Ryan's Furniture Exchange, Inc. v. McNair, 162 So. 483 (Fla. 1935). The State of Florida itself provides procedures through which a "homestead owner" can prevent a forced sale and further provides an adequate remedy to "homestead owners" who have lost their home through a forced sale. See Florida Statute Chapter 222. Although the statutes in Chapter 222 may not provided Petitioner with all the relief which may be available to her under 42 U.S.C. 1983, they could have fully compensated her for the property loss allegedly sustained. Said available remedies are sufficient to satisfy the requirements of due process. Parratt v. Taylor, 451 U.S. 527 (1981).

Petitioner alleges that Sgt. Tranium

of the Office of the Orange County Sheriff denied her a constitutionally required opportunity to redeem her property subsequent to the Sheriff's sale. Petitioner fails to cite to any particular source of this alleged right. In truth, there exists no legal right (constitutionally or otherwise) to redeem property following such a sale.

It would appear that the Petitioner has confused a Sheriff's sale with a mortgage foreclosure wherein under certain circumstances there does exist an opportunity to redeem one's interest in property which has been foreclosed upon. Petitioner's Third Amended Complaint fails to demonstrate how any denial of a right to redemption following a Sheriff's sale constitutes a violation of Petitioner's constitutional rights to procedural due process or equal protection as Petitioner seems to be asserting in paragraph

44 of the Third Amended Complaint. In a lower court Order dated October 25, 1985, the court, on page 8, paragraph 1, rejected Petitioner's contention that she was constitutionally required an opportunity to redeem the property pursuant to the issuance of a deed by the Sheriff. The court ordered that paragraph 13 of the original Complaint alleging the existence of such a constitutional right be stricken. Unfortunately in her Second and Third Amended Complaints Petitioner merely moved the allegations of former par. 13 to other numbered paragraphs.

It should not be overlooked that Petitioner did not assert the unconstitutionality of Florida Statute 56.22 at any time in the state court dissolution of marriage proceedings where Petitioner sought to prevent the sale from taking place and later sought to have the sale set aside. In those pro-

ceedings Petitioner advanced other arguments as to why the sale should not have taken place. In Almon v. Sandlin, 603 F.2d 503 (5th Cir. 1979), the Fifth Circuit Court of Appeals held that if a Petitioner does not assert the unconstitutionality of a state statute in the state proceedings, he has waived his unconstitutionality claim.[1] Respondents therefore assert that this Court may not now properly consider whether Florida Statute 56.22 is unconstitutional as asserted by Petitioner.

Respondents further assert that Petitioner's claims attacking the constitutionality of Florida constitutional provisions and statutes are barred by the doctrines of res judicata and/or

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1. In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) the Eleventh Circuit adopted as binding precedent all decisions of the Fifth Circuit rendered prior to 10/1/81.

collateral estoppel. Petitioner submits that the Sheriff's sale of April 30, 1984, should be set aside as the Notice of Sheriff's Sale is unconstitutionally vague and because the homestead exemption provision of Article X, Section 4 of Florida's Constitution (which was in effect at the time of the sale) unconstitutionally discriminated against single women who were not the head of a family. In several prior judicial proceedings in Florida state courts Petitioner sought to have the Sheriff's sale of April 30, 1984, set aside. After having received notice of the sale, but prior to it taking place, Petitioner filed an emergency motion in the Circuit Court in and for Orange County, Florida, (Case No. CI-83-4144) seeking to prevent the scheduled sale from taking place. (Par. 41(L), Third Amended Complaint (R4-102) and Exhibit "D" attached thereto.) Said

motion was denied on April 26, 1984. (Exhibit "BB" of Third Amended Complaint.) Subsequent to the sale Petitioner filed a notice to vacate the Sheriff's sale of April 30, 1984. (Pars. 41(N), 57 and 58 and Exhibit "II" of Third Amended Complaint.) Petitioner's motion to vacate the sale was denied on June 13, 1984. (Exhibit "JJ" to Third Amended Complaint.)

Following the denial of her motion to vacate the Sheriff's sale, Petitioner filed appellate proceedings in the Fifth District Court of Appeal, State of Florida (Case No. 84-959) where she again attacked the validity of this sale and sought to have it set aside. The Fifth District Court of Appeal for the State of Florida dismissed Petitioner's appeal. (See Count V of Petitioner's original Complaint filed in this action.) Thus it is clear that Petitioner, in several

previous court proceedings, unsuccessfully attempted to have the Sheriff's sale declared invalid and set aside. Petitioner is therefore barred by the doctrines of res judicata and/or collateral estoppel to now present such claims attacking the validity of the sale.

Generally the doctrine of res judicata bars subsequent litigation where there is an identity of the things sued for, an identity of action, identity of persons and parties to the action, and an identify of the quality or capacity of the person for or against whom the claim is made. Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486 (11th Cir. 1985). However, the bar of res judicata extends not only to the precise legal theory presented in the previous litigation, but rather to all legal theories and claims arising out of the same operative nucleus of facts. Olmsted v. Aamco

Oil Company, 725 F.2d 627 (11th Cir. 1984), reh. den. 731 F.2d 891; First Alabama Bank of Montgomery, N.A. v. Parsons Steel, Inc., 747 F.2d 1367 (11th Cir. 1984). The principle of res judicata bars relitigation of the same claim even where a new theory is advanced as the basis for relief in a second suit. United States v. Stewart, 689 F.2d 759 (8th Cir. 1982), cert. den. 103 S.Ct. 1427, 460 U.S. 1037, 75 L.Ed.2d 788. A second action advancing a different legal theory than was presented in the first action, but which is based upon the same events and injuries is barred by a final decision in the first action where that theory could have been argued as an alternative or an additional ground for recovery. Bushman v. Safeway Stores, Inc., 608 F.Supp. 232 (D.C. Nev. 1985); John Alden Life Insurance Company v. Cavendes, 591 F.Supp. 362 (S.D. Fla.

1984). A plaintiff must take advantage of an opportunity to assert all theories against a defendant upon which she might recover; a plaintiff should not be allowed to litigate in a subsequent action that which could have been advanced previously. Bushman v. Safeway Stores, Inc., supra. A final judgment is conclusive not only as to the claims adjudicated, but also as to claims which could have been adjudicated. Hence, where a judgment on the merits is rendered in favor of a defendant the plaintiff may not bring a second suit based on the same cause of action but seeking recovery on a different theory. Herendeen v. Champion International Corp., 525 F.2d 130 (2nd Cir. 1975). A comparison of Petitioner's attack on the validity and constitutionality of the Sheriff's sale made in the Federal District Court with the above-described previous state court proceed-

ings leaves no doubt that the Petitioner's state court allegations and the federal case were predicated upon the same occurrences, events and set of facts. Though it is true that the Third Amended Complaint filed by Petitioner describes the facts surrounding the Sheriff's sale in greater detail than would appear in the previous state court proceedings, this does not avoid the proper application of the doctrine of res judicata to bar Petitioner's present pursuit seeking to have the sale set aside. Rosenthal v. State of Nevada, 514 F.Supp. 907 (D.C. Nev. 1981).

The lower court rejected the mutuality of parties requirement as an essential element for the application of collateral estoppel. Hann v. Carson, 461 F.Supp. 854 (M.D. Fla. 1978). The elimination of the mutuality requirement for collateral estoppel is based upon the view that once

a party has had a full and fair opportunity to litigate a question, he ought not to be permitted a second opportunity to litigate the same question in the later case simply because he has a different adversary. Hann v. Carson, supra. Other federal courts have also stated that a litigant may assert collateral estoppel even though he was not a party to a prior suit. Cotton States Mutual Insurance Company v. Anderson, 749 F.2d 663 (11th Cir. 1984); Matter of Raiford, 695 F.2d 521 (11th Cir. 1983).

Though, as indicated above, a mutuality of parties is no longer a requirement for the application of the doctrine of collateral estoppel, here we really are dealing with a mutuality of parties even though the Sheriff, Lawson Lamar, was not named as a defendant in the prior state court proceedings. The described state court proceedings sought to prevent a

sale by the Sheriff from taking place and further sought to vacate a sale conducted by the Sheriff and the issuance of a Sheriff's Deed to Mrs. Simpson's half-interest in certain real property. Though perhaps not named as a defendant, the Sheriff is a "silent" party and perhaps may even be described as a real party in interest in proceedings attacking the validity of a Sheriff's sale. All of the "identities" needed for the application of the doctrines of res judicata and/or collateral estoppel are present in this case. Petitioner should not be allowed to relitigate a claim which was previously considered and resolved by Florida State Courts.

In the case of Billingsley v. Seibels, 433 F.Supp. 1 (N.D. Ala. 1976), plaintiffs attacked the validity of a deed which conveyed real property that was foreclosed at a public improvement

sale. Claims were made in the State court that the real estate transfer was void under 42 U.S.C. 1983 and the due process clause of the Fourteenth Amendment. The Alabama Supreme Court determined that the deed was valid. The plaintiffs then filed another civil rights action in which they sought to have the deed declared invalid in the Federal court. The Federal court action involved the same real estate and many of the same parties, though not all of the same parties. The Federal court found that the judgment entered in the Alabama court barred relitigation between the original parties of the matter adjudicated therein. However, the court went on to find that the doctrine of collateral estoppel could properly be asserted by other defendants named in the Federal court action even though they were not parties to the State court action.

In this case, even though Sheriff Lawson Lamar was not specifically named as a party to the State court proceedings, he may properly invoke the doctrine of collateral estoppel and/or res judicata which would prevent a relitigation of claims that Florida Statute 56.22 and Article X, Section 4 of the Florida Constitution of the State of Florida are unconstitutional.

II.

THE PETITIONER WAS NOT PRECLUDED FROM MAKING A BID ON HER FORMER MARITAL RESIDENCE AND WAS NOT DENIED SUBSTANTIVE DUE PROCESS WHEN SHE WAS NOT ALLOWED AN OPPORTUNITY TO REDEEM PRIOR TO FINAL DEPRIVATION OF HER PROPERTY.

Question Two is merely a reargument of the same question presented to the Eleventh Circuit Court of Appeals. No new authority is cited by Petitioner.

The trial court did not err in ruling that Petitioner failed to state a cause of action for denial of equal protection

based upon Petitioner's claim for homestead exemption of her half-interest in a former marital residence.

In Count V of the Third Amended Complaint, Petitioner sued Respondents SIMPSON, YOUNG, GILES, HEDRICK & ROBINSON, P.A., PLAUT and LAMAR, and alleged that she had been denied her constitutional right to own and hold homestead property because "the Florida constitutional provision in effect at the time of the forced sale of her homestead disallowed the forced sale of homestead of married or single persons, but not for single women who were heads of their own household..." (R4-102-39).

Petitioner alleged that she had been denied equal protection of the laws guaranteed to her by Title 42, U.S.C. Section 1983 and, further, had been discriminated against on the basis of her sex and on the basis of her being a

single head of her own family unit, in violation of 42, U.S.C. Section 1985(3). (R-102-39).

Article X, Section 4A of the Florida Constitution, in effect in April of 1984, provided that the Florida homestead provision applied to property "owned by the head of a family". "Head of a family" is defined as applying to those who are responsible, either legally or morally, for the welfare of someone else and is based upon being able to establish "support obligations". Edward Leasing Corp. v. Uhlig, 652 F.Supp. 1409 (S.D. Fla. 1987); In Re: Shorr's Estate, 409 So.2d 487 (Fla. 4th DCA 1982); Flannery v. Green, 482 So.2d 400 (Fla. 2d DCA 1986).

In the trial court ruling, the court found that the Florida homestead provision did not discriminate on the basis of gender, which might have stated a claim

under 42 U.S.C. Section 1985(3) (R6-194), citing Califano v. Goldfarb, supra and Holden v. Estate of Gardner, 420 So.2d 1082 (Fla. 1982)). In Holden, supra, the court specifically found that the presumption that a husband is the head of family was abrogated by the 1971 amendment to Section 61.09, Florida Statutes. Section 61.09 of the Florida Statutes placed a duty of support on both spouses and has been construed as abrogating the presumption that the husband is the head of family, citing Cory v. Parks, 386 So.2d 292 (Fla. 2d DCA 1980). Id. at 1085. Holden, supra, concluded that the head of the family may be either the husband or the wife.

Additionally, Florida law has held that there can be only one head of family and no presumption of headship goes to the husband. In Re: Estate of Melisi, 440 So.2d 584 (Fla. 4th DCA 1983); see

also Nationwide Financial Corp. of Colorado v. Thompson, 400 So.2d 559 (Fla. 1st DCA 1981).

Petitioner argues that the November 1984 amendment to Article X of the Florida Constitution has some bearing on this case. The amendment of Article X of the Florida Constitution had nothing to do with correcting any class-based discrimination. The 1984 amendment changed the term "head of family" to "a natural person".

> The amendment thus expanded the class of persons who can take advantage of the homestead provision and its protections.... As representative Hawkins, who sponsored the amendment in the House of Representatives, explained, the purpose of the revision was 'to give protection against forced sale for the homestead of a single person, a divorced person, any person who has a homestead, rather than just a head of a family.' House Judiciary Full Committee Meeting, March 29, 1983. Public Health Trust of Dade County v. Lopez, 531 So.2d 946 (Fla. 1988).

The Third Amended Complaint clearly attempted to state a cause of action for discrimination based on sex. Under no stretch of the facts or the law, would the application of Article X, Section 4 result in sexual discrimination.

Petitioner states that she has shown sufficient facts to demonstrate the motivation from which a jury could reasonable infer the existence of a conspiracy in violation of Title 42, U.S.C. §1985(3).

In order to recover under 42 U.S.C. 1985(3) the Petitioner must prove: (1) a conspiracy, (2) to deprive, directly or indirectly, any person or class of persons of equal protection or a privilege of immunity protected by law; (3) that the conspirators committed some act in furtherance of the conspiracy; and (4) that the Petitioner was "injured in his person or his property" or was

"deprived of having and exercising any right or privilege of a citizen of the United States." Griffin v. Breckenridge, 403 U.S. 88, 103-104 (1971).

Thus, under either Section 1983 or Section 1985(3) it is essential to Petitioner's claim that she be able to plead and prove a conspiracy between the Respondents. The District Court has ruled that Petitioner has done neither. Petitioner's allegations of conspiracy are conclusory and are not supported by any evidence.

Count VII essentially is a restatement of the allegations of Count II regarding the sale of the Petitioner's one-half interest in the former marital residence. This time, instead of being brought under Title 42 U.S.C. Section 1983, the allegations are made under 42 U.S.C. Section 1985. Again, broad allegations of conspiracy are made against

Respondents. It is Petitioner's contention that Respondents owed the Petitioner various duties, none of which are supported by the facts or the law. Obviously, the interests of Respondents Terry Young and Donald Simpson were completely adverse to those of Petitioner. Further, the District Court's granting summary judgment was correct given the absence of any genuine issue of material fact that the Respondents were, at all times, acting in accordance with and pursuant to valid legal process.

In order to withstand a Motion to Dismiss, the Petitioner must assert at least minimum support for the existence of a conspiracy. Robinson v. McCorkle, supra. It is necessary that the complaint state more than allegations of deprivation of constitutional rights. Id. at 113. Petitioner is not entitled to pursue an action merely because she

believes, without factual support, that a conspiracy existed.

The District Court properly found that Petitioner did not state a cause of action for denial of equal protection under either 42 U.S.C. Section 1983 or 42 U.S.C. Section 1985(3) and further properly granted the motions for summary judgment as to Count V of the Third Amended Complaint.

III.

THE TRIAL COURT DID NOT ERR IN DISMISSING WITH PREJUDICE AND GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON PETITIONER'S CLAIMS PREDICATED UPON ALLEGATIONS OF UNLAWFUL ARREST AND EXCESSIVE USE OF FORCE.

A. RESPONDENT LAMAR WAS PROPERLY GRANTED A SUMMARY JUDGMENT ON PETITIONER'S 1983 AND 1985 CLAIMS OF UNLAWFUL ARREST AS PETITIONER CONCEDED SHE HAD NO EVIDENCE TO ESTABLISH THAT THE ALLEGED EXCESSIVE USE OF FORCE WAS THE RESULT OF AN OFFICIAL POLICY, STATUTE, ORDINANCE, REGULATION OR CUSTOM OF THE SHERIFF.

In Counts IV and V of her Third Amended Complaint (R4-102) Petitioner incorporates by reference Count I which

includes the allegation that a deputy sheriff used excessive force in arresting Petitioner during a court-ordered forcible entry of the Simpsons' house. The deputy sheriff who effected the arrest of Petitioner was Edward J. Noyes. Petitioner has not sued Deputy Noyes. She did, however, include as a defendant in her lawsuit the Sheriff of Orange County, Florida, Lawson Lamar. Sheriff Lamar is sued in his official capacity. No allegation is made that Respondent Lamar was present at the time of Petitioner's arrest; neither is there any allegation of Lamar having personally participated in the arrest.[2] As the trial court judge

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2. Petitioner states at pages 52-53 of her brief that only one deputy sheriff was present at the time of her arrest and that such constitutes a violation of a policy of the Orange County Sheriff's Office which requires using two deputies

correctly pointed out to Petitioner in her Order of July 10, 1989, Petitioner must demonstrate that the constitutional deprivation was the result of a governmental custom, policy, ordinance, regulation or decision officially adopted or promulgated by the Office of the Sheriff if she is to recover against Lamar for the actions of Deputy Noyes. (R 6-194; Id.. at 690-691). In order to prevail upon her claims of unlawful arrest and the use of excessive force during that arrest Petitioner would have to demonstrate a causal link between an official policy, ordinance, practice or

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for domestic disputes. No citation to the record on appeal in support of such statement is made. Respondent Lamar respectfully submits that these facts and the policies of the Office of the Sheriff as described by Petitioner are incorrect.

custom and her injuries. Byrd v. Clark, 783 F.2d 1002, 1008 (11th Cir. 1986).

In Lamar's supplement to his Motion For Summary Judgment (R7-201) the Sheriff sought summary judgment on Counts IV and V of Petitioner's Third Amended Complaint. Lamar asserted that summary judgment was warranted as the affidavits submitted in support of his supplement indicate that the deputy sheriff who arrested Petitioner during the forcible entry of the Simpson house did not use excessive force and that any alleged use of excessive force during the arrest was not pursuant to a custom, policy, ordinance or decision adopted and promulgated by the Office of the Sheriff. A response filed by Petitioner attached an affidavit of a person who was allegedly present during the arrest, Mary Pruitt. (R7-208) In that affidavit Ms. Pruitt suggests that excessive force was used upon Peti-

tioner by the arresting officer. Simpson asserted to the trial court judge that the affidavit of Pruitt presents conflicting evidence during the deputy sheriff's behavior which creates a genuine issue of material fact sufficient to withstand the Motion For Summary Judgment filed by Defendant Lamar. However, in her response to Lamar's supplement to his Motion For Summary Judgment Petitioner "concedes that she has no evidence that [the deputy sheriff's alleged use of excessive force] resulted from a policy of the Sheriff of Orange County..." (R7-208).

In Celotex Corp v. Catrett, 477 U.S. 317, 323 (1986) the United States Supreme Court determined that summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party

will bear the burden of proof at trial. The court has further explained "that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported Motion For Summary Judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986) (emphasis in original). The lower court judge correctly found that though there may be a dispute over whether excessive force was used, this is not sufficient to withstand a Motion For Summary Judgment when there is no evidence to establish the existence of an element essential to her case, i.e., that the alleged excessive use of force was the result of an official policy, statute, ordinance, regulation, custom or usage. See Brown v. City of Clewiston, 848 F.2d 1534, 1537

(11th Cir. 1988).[3]

B. RESPONDENTS WERE PROPERLY GRANTED A SUMMARY JUDGMENT ON PETITIONER'S PENDENT STATE LAW CLAIM OF FALSE ARREST AS THE UNDISPUTED EVIDENCE DEMONSTRATED THAT THERE WAS PROBABLE AND LAWFUL CAUSE FOR THE ARREST.

In Count VIII of her Third Amended Complaint Petitioner sued Respondents Donald Simpson, Terry Young, Giles,

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3. Affidavits of the arresting officer, Edward J. Noyes, and of Defendant Lawson Lamar were attached to Defendant Lawson Lamar's Supplement To Motion For Summary Judgment. (R7-201) Both of those affidavits reflected that the Office of the Orange County Sheriff did not have a policy, procedure, practice or custom (official or unofficial) which permitted employees or appointees of the Sheriff to use excessive, unreasonable or unnecessary force in the arrest and/or detention of persons. The Sheriff's policies, customs, rules and regulations prohibited a deputy from using excessive, unnecessary or unreasonable force when arresting or detaining a person. The affidavits further reflect that all deputy sheriffs such as Deputy Noyes had received instruction on the policies of the Office of the Sheriff. Deputies further received from the Office of the Sheriff instructions on the protection of an arrestee's constitutional and civil rights.

Hedrick & Robinson, P.A. and Lawson Lamar for the allegedly false arrest of her on or about October 6, 1983. Petitioner sought to have the lower court exercise its pendent jurisdiction over such claim. The trial court exercised its discretionary jurisdiction over Petitioner's false arrest claim. In her order of July 10, 1989, United States District Court Judge Patricia C. Fawsett concluded that the Respondents were entitled to the entry of a summary judgment in their favor on Count VIII of the Third Amended Complaint. This ruling of the trial court judge was correct.

The unrefuted facts of record show that the Sheriff's Office in entering Petitioner's home acted pursuant to a State Court Order which granted permission for forcible entry of the home during Respondent Donald Simpson's recovery of his personal property kept there.

(Deposition of Petitioner 9/29/86, pg. 74; 5/2/86, pg. 102) The State Court Order was granted after a hearing which Petitioner attended. The Court Order also specifically gave the Sheriff authority to arrest any person who interfered with the execution of the Order. (Deposition of Petitioner 5/2/86, pg. 103). In her Third Amended Complaint Petitioner acknowledges that she protested the taking of some items of personal property prior to her being arrested. She has stated that she objected to the seizure of the items during the entry. (Deposition of Petitioner 9/29/86, pg. 87). Petitioner further admitted during a deposition that she had resisted arrest. (Deposition of Petitioner 9/29/86, pg. 104).

There can be no doubt but that there was probable cause for the deputy sheriff to arrest Petitioner. The trial court

judge properly found that there was no evidence of record to show that Petitioner had been falsely arrested. The Sheriff's deputy was executing a State Court Order when he went to the house and ultimately arrested Petitioner. Respondents Donald Simpson and Terry Young of Giles, Hedrick & Robinson, P.A. were merely pursuing legal means as adversaries to Petitioner in a legal proceeding to recover Donald Simpson's property. The trial court judge correctly observed that:

> In essence, plaintiff is complaining about state court orders which divided the marital estate and gave Defendant [Donald] Simpson the right and means to recover his property. Based on the unrefuted facts of record, summary judgment as to Count VIII is granted in favor of Defendants.

IV.

THE TRIAL COURT DID NOT ERR WHEN IT HELD THAT PETITIONER FAILED TO ADEQUATELY PLEAD OR PROVE A CONSPIRACY BECAUSE THE "UNDER COLOR OF STATE LAW" REQUIREMENT OF U.S.C. §1983 HAD NOT BEEN MET.

Petitioner seeks recovery under 42 U.S.C. Section 1983. In order to recover under 42 U.S.C. Section 1983, Petitioner must first prove that Respondents have deprived her of rights secured under the constitution and laws of the United States. Secondly, she must show that the Respondents acted "under color of law." Adickes v. S. H. Kress & Company, 398 U.S. 144, (1970). This requires Petitioner to demonstrate that there was a state actor or that those Respondents who are private individuals conspired with a state actor. See Dennis v. Sparks, 449 U.S. 24, 27-29 (1980). Private citizens cannot be liable under Section 1983 unless they and a public official "acted with a common understanding" or "meeting

of the minds" to deprive the Petitioner of her constitutionally protected rights. Hassell v. City of Philadelphia, 507 F.Supp. 814, 818, (E.D. PA 1981) quoting, Augenti v. Cappellini, 84 F.R.D. 73, 77 (N.D. PA. 1979).

Thus, under Section 1983 it is essential to Petitioner's claim that she be able to plead and prove a conspiracy between the Respondents. The District Court has ruled that Petitioner has done neither. Petitioner's allegations of conspiracy are conclusory and are not supported by any evidence.

Petitioner's Third Amended Complaint is replete with allegations of conspiracy between Respondents and various state court judges. The Petitioner is relying on such allegations to provide the "under color of state law" connection necessary for an action under 42 U.S.C. Section 1983. All of Petitioner's allegations in

that regard depend solely on conclusory statements that there was a conspiracy. This does not comport with the requirements for stating a cause of action under 42 U.S.C. Section 1983. "The naked assertion of a conspiracy between a state judge and private defendants without supporting operative facts provides an insufficient state action nexus for a Section 1983 action." Phillips v. Mashburn, 746 F.2d. 782, 785 (11th Cir. 1984).

A review of the Third Amended Complaint and its voluminous attachments makes it clear that the Petitioner has been afforded ample opportunity to seek redress of her grievances. The instant action which seeks to state a claim under the Civil Rights Act is an obvious attempt to use the Federal Court system to obtain a more favorable result than that obtained in state court. In fact, Ms.

Simpson now seeks collateral review of the state court proceedings. In short, this proceeding is nothing more than a complaint about the decision of state court judges under the guise of a Section 1983 action. Federal Courts, however, are not a forum for appealing state court decisions. Staley v. Ledbetter, 837 F.2d. 1016, 1018 (11th Cir. 1988).

Petitioner cannot establish a prima facia case to support her allegations. She is unhappy with the result of her dissolution of marriage action and has worked backwards from that result to spin a web of allegations supported by nothing more than innuendo, conjecture, and assumptions. As the Supreme Court observed in Dennis v. Sparks, supra: "Merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator with the judge."

Paragraph 12, of Count I of Petitioner's Third Amended Complaint alleges that Petitioner's federal constitutional right to be heard by an impartial judge was deprived by "obtaining the recusal of the original circuit judge, Richard B. Cooper, and the reassignment of the original divorce action to William C. Gridley." This allegation suggests that Petitioner desired to have her dissolution proceeding resolved by a judge who was unbiased. In fact, what Petitioner is upset about is losing a judge she felt was biased in favor of women. At page 122 of her April 29, 1986, deposition (R-5-153), Mrs. Simpson testified that she has been told "Judge Cooper was compassionate towards women because he had lost two wives to cancer and that Judge Gridley was a male chauvinist.." Thus, the only apparent basis for making

an issue of the change in judges is that Petitioner liked Judge Cooper better than Judge Gridley.

Petitioner's testimony on this subject fails to reveal any basis to support any allegation of improper conduct on the part of Respondents regarding the service of Judge Cooper in the original dissolution action. At page 9 of this deposition which was taken on April 30, 1986, Respondent Young was asked:

Q: Do you recall if you filed a Motion to recuse Judge Cooper?

A: Absolutely not. There was no grounds for that.

Q: Was that a sua sponte order?

A: If you mean that he did it on his own motion or for some reason that I don't know about, that is correct. (R5-153).

Petitioner contends that she has

tried to obtain a remedy from the state courts but has been unsuccessful in obtaining the relief requested because of misrepresentations made by Respondents before the courts. Accepting this allegation as true, Petitioner's Complaint becomes one of misuse or abuse of legal process which is not a basis for a claim under 42 U.S.C. Section 1983. See E. G. McDougald v. Jenson, 786 F.2d. 1465, 1488-98 (11th Cir. 1986), cert. denied, 479 U.S. 860 (1986) which cites the general rule in the Eleventh Circuit that a private individual does not act under color of state law by engaging in litigation, even in bad faith, unless that individual is compelled by state law to bring suit or is acting under the authority or pretense of authority of the state.

Count II of Petitioner's Third Amended Complaint seeks relief under 42 U.S.C.

Section 1983 and focuses on a series of events which led to Donald Simpson purchasing the Petitioner's one-half interest in the marital residence. Paragraph 40 of Count II alleges that Respondents "did act in collaboration or jointly and under color of law of the State of Florida to deprive the Petitioner of her rights, privileges and immunities secured to her under the United States Constitution and its laws ..." These allegations are of the broadest nature and are unsupported by the evidence.

The truth of the matter is that it was Petitioner's own actions and omissions which led to her husband, Donald Simpson, being in a position to purchase the marital residence. During her deposition of April 30, 1986, (R5-153), Petitioner was asked:

Q: You will agree with me, that you were fully aware that there

was going to be a sale between 11:00 a.m. and 2:00 p.m. on the 30th of April of that house?

A: Yes.

Again at page 45 of her deposition taken on May 2, 1986, (R5-153), Mrs. Simpson was asked:

Q: Before the Sheriff's sale you knew that the sale was going to take place between the hours of 11:00 a.m. and 2:00 p.m.

A: Uh-umm.

Q: Did you not?

A: Yes.

There is no credible testimony to implicate Respondents in wrongdoing regarding Donald Simpson's purchase of Petitioner's one-half interest in the house. Petitioner's misapprehension of the terms of the Sheriff's sale is not Respondents' fault. It is evident that Petitioner does not understand what a

conspiracy is and has no facts to back up her allegations. Terry Young only found out about the Sheriff's Sale by coincidence when his secretary saw the notice in the paper. (R5-153) Deposition testimony reveals that Mr. Young did not participate in the sale.

In short, Petitioner is not entitled to pursue an action merely because she believes, without factual support, that a conspiracy existed. Therefore the District Court correctly dismissed and granted summary judgment of Petitioner's claims under 42 USC §1983.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

William G. Osborne, Esquire
538 East Washington Street
Orlando, Florida 32801
(407) 843-5211
Attorney for Respondent, Donald Simpson

Tanya M. Plaut, Esquire
506 Mariposa Street
Orlando, Florida 32801
(407) 425-6610
Attorney for Respondent, Tanya Plaut

Lavinia Dierking, Esquire
11 East Pine Street
Orlando, Florida 32801
(407) 425-1802

Jeffrey M. Fleming, Esquire
Post Office Box 3427
Orlando, Florida 32802
(407) 849-6459

Attorneys for Respondents, Terry C. Young and Giles, Hedrick & Robinson, P.A.

Jeffrey G. Slater, Esquire
605 East Robinson Street
Orlando, Florida 32801
(407) 425-4251
Attorney for Respondent, Lawson Lamar, Sheriff of Orange County, Florida

James W. Glatt, Esquire
111 North Orange Avenue
Suite 2000
Orlando, Florida 32801
(407) 841-7000
Attorney for Respondent, Minnie Bridges